

SOUTH AFRICA / JUDGMENT

# Lukhele v S (A115/2019) [2020] ZAMPMHC 16 (15 June 2020)

**[2020] ZAMPMHC 16****COURT**

Middelburg High Court, Mpumalanga

**BEFORE**

Kgoele, Bam

**CASE / FILE NUMBER**

A115/2019

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**Source record**

IN THE HIGH COURT OF SOUTH AFRICA,  
MPUMALANGA DIVISION, MIDDELBURG  
(LOCAL SEAT)

(1)

**REPORTABLE:**

YES

(2)

OF

INTEREST TO OTHER JUDGES: YES

(3)

**REVISED:**

YES

CASE NO: A115/2019

**In the matter between:**

In

**the appeal between:**

NICOLAAS

SAMSON

LUKHELE

Appellant

and

THE

STATE

Respondent

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**JUDGMENT****KGOELE ADJP**

1. On 4 November 2014 around 23h30 midnight, in Mhluzi, Middleburgh, the complainant and his girlfriend were

surprised by two men who pointed them with firearms whilst they were seated in the complainant's car in front of his girlfriend's

parents place. They were instructed to get out of the car. The two men climbed into the car and drove away with it. Within three hours of him having reported the robbery to the police, the police called the complainant and reported to him that they found a car similar to the one he was allegedly robbed of. He was taken to the scene where it was found by the police, and positively identified it. The car was damaged at the time as it had overturned. The police told him they found the appellant in the car.

2. It is common cause that the appellant was found at the scene where the car was ultimately retrieved after it overturned. The circumstances as to how he was found at the scene is a hotly contested issue in this matter, as it will be seen later in this judgement. As a result of him being found at the scene together with the car, he was arrested, charged and eventually convicted on a charge of Robbery with aggravating circumstances. He was sentenced to fifteen (15) years direct imprisonment on the 13th of November 2015. His appeal is before this Court on both conviction and sentence after leave was granted by the Regional Court held at Middleburg.

3. According to the two police officers who testified before the trial Court, the circumstances that led to the

appellant's arrest and recovery of the car are as follows: They spotted the complainant's car as the one that was reported on when they were doing patrol duties during the night. This was after they received a police radio message to the effect that the tracker signals reveals that it was roaming around and going towards Witbank. They further got another message that it was turning towards Clewer Road. Whilst driving to that direction they saw a car traveling on a bridge in that road. The only time they could recognise the said car well and its registration number, was when they met with the said car when they were turning into Clewer Road and it was also turning into the road they were traveling in. They also managed to see that the driver was alone in the car.

4. They quickly made a U-turn and followed it. They flashed their blue lights to try and stop it whilst following it, but it then accelerated. They kept on following it and increased their speed to +/- 140km per hour. During the chase, the said car failed to negotiate a curve and went straight into a heap of sand that was at the curve outside the road and it overturned. After stopping their car, they went directly to the said car immediately after it came to a standstill. They found the appellant inside the car still strapped in his seatbelt on the driver's side. They took him out of the car and he was eventually arrested.

5. The appellant's version which is diametrically opposite to the evidence of the police is that he was

not alone in the car when it was so spotted by the two police officers. According to him he was seated at the back seat of the car as he had requested the driver of the car and his passenger, who were both unknown to him by then, to give him a lift. They were both seated in the front seats. He did not deny that the police gave chase to the car they were driving in, but testified that he did not know the reason why, as he had hitchhiked a ride. According to him the driver and his passenger had agreed to take him to his parental home in Ogies. His reason for hitchhiking a ride/ lift during the late hours of that evening was that he had no other option since his friend who promised to take him to his parental home to see his sick father disappointed him. He did not show up at the Tavern where he was waiting for him as agreed. He further admitted that the car overturned but denied that he was found inside, and on the driver's seat with the seat belt still strapped around him. He indicated further that the driver and his passenger possibly ran away but could not say this with certainty because he was dizzy and did not know what happened after the car overturned. He denied being an assailant or part of the assailants who robbed the complainant of his car.

6. In as far as the conviction is concerned, the epicentre of the grounds relied upon by the appellant is that there were material contradictions and improbabilities in the evidence of State. Firstly, in the testimony of the second witness who testified on behalf of the respondent (Mr. Mashiane) both as to time orientation which was found in his evidence in chief and his written statement. Further that, there was a further contradiction between the second and the third witness (Mr Mashamba) as to how the applicant was taken out of the vehicle.

7. With regard to the sentence, the grounds relied upon are:

- That the trial Court erred in finding that there are no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of fifteen (15) years;
- That the sentence is out of proportion and shocking;
- That the trial Court failed to take into account that there were no shots fired and nobody was injured.

#### THE INCOMPLETE RECORDS

8. The appellant's Counsel raised as a Point in Limine the incompleteness of the record of proceedings. She argued that due to the fact that the record was incomplete, the appeal in respect of both the conviction and the sentence cannot properly be adjudicated and therefore, on this reason alone, the conviction and sentence should be set aside. Counsel representing the respondent vehemently disagreed with the proposition that the conviction and sentence be set aside, citing as a reason the fact that even though the records are incomplete, the available records of the proceeding are sufficient for this Court to consider the appeal as a whole.

9. It is common cause that the record of proceedings is not complete and that the missing parts of the record

cannot be reconstructed because the Presiding Officer who heard the matter has passed away. The following are missing in the record.

- Part of the recording of the 15/07/2015 (the evidence of Mashiane). It appears that what was said when the Court resumed on that day was not recorded as the recording start with cross-examination;
- The whole evidence of the respondent's second witness Mr. Mashamba including his Cross-examination is not available;
- The whole part of the sentencing proceedings immediately after the previous convictions were dealt with.

10. The importance of a proper record of the proceedings and its right to a fair trial was succinctly confirmed in *S v Schoombie and Another*[1].
11. When a record is inadequate for a proper consideration of an appeal, it will as a rule, lead to the conviction

and sentence being set aside[2].

12. An accused is not ipso facto entitled to his discharge if the record or portions thereof get lost. In *S v Leslie*, it was found that information on what was testified or said during trial should be sought from every source that can make a contribution[3]. The general principle applies, notwithstanding the loss of the whole or part of the record and notwithstanding that the evidence had disappeared or that the tape had not recorded the evidence[4].
13. In the case of *Machaba and another v S*[5], the Court held that the question of whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal. The Court also held that the adjudication of that appeal on the record as it stood would not prejudice either of the appellants.
14. In the case of *Leslie* already quoted above the following was said at paragraph 8 as one of the considerations a Court faced with missing records should consider:

*“8.1 Firstly, the materiality of that which is missing to the decision of the court a quo and to the appellate re-hearing (or, in review proceedings, the consideration of whether justice was done). It may be relatively inconsequential if the evidence-in-chief of a single witness is lost but the cross-examination of that witness is available and the cross-examiner traversed the whole terrain, raising the alleged contradictions between the evidence in chief and later evidence. In a particular case the loss of only a portion of cross-examination may be extremely important. In another, the total loss of the evidence of a corroborating witness in a rape case may be unimportant if the complainant's evidence.”*

15. As it was decided in *S v Mantsha*[6], the delay on the part of the appellant in bringing the appeal is one of the factors to be considered. The longer the delay, generally speaking, the more reluctant will a Court of Appeal be, to condone the Appeal. In *S v Van Staden*[7] the record went missing during the delay and could not be reconstructed precisely because of the extraordinary length of delay.
16. The relevance of who to blame on the part of the accused was initially emphasized in the case of *Makhudu v The Director of Public Prosecution*[8].
17. It is common cause in casu that there was a delay of about two (2) years before the appellant could lodge the application for leave to appeal. He was sentenced on the 13th of November 2015 and his application for leave to appeal was filed on the 28th of November 2017. Condonation for filing the leave to appeal late was filed on the 30th of January 2018. We do not have a record of the leave to appeal, but a copy of the record book where the Order was made which was attached to this record by the Clerk of the Court that serves as proof that it was duly granted. The said copy reveals that his application was heard by a different Presiding Officer Mr. Minnie, who on the 16th of February 2018, granted him condonation including leave to appeal to this Court.
18. Although we are not told when the Presiding Officer Mr. Mashigo passed on, and the reason why Mr Minnie had to do the leave to appeal application, it appears that it was for the reason that Mr Mashigo was no longer available/ had passed on. For the reason that this appeal is regarded as one of the backlogs in this Division and were specifically put on the roll with the special concession that they should be given a priority, this Court did not follow up the existence of or request the record of proceedings of the leave to appeal and accepted the fact that the Presiding Officer Mr. Minnie, had already accepted the explanation that was proffered in the affidavit that accompanied the application. The long and short story of these circumstances is that even though we cannot put the blame on the door of either of the parties before us, the delay is inordinately long and contributed to the inability to reconstruct the record as the process thereof appears to have started after the passing on of the presiding officer.
19. Be it as it may, for the reasons that will follow, which reasons cannot be dealt with separately as they are inextricably bound with the merits of the issues this Court will be grappling with, especially with regard to the conviction in this matter, I am of the view that the adjudication of this appeal on the record as it stands, will not prejudice the appellant. The materiality of the defects in this record are not of the magnitude such that a proper consideration of the appeal both on conviction and sentence is not possible. The appellant's conviction and sentence cannot be set aside merely on the basis of the record being incomplete. The setting aside, even though the record is not complete, will in my view also not be in the interests of justice.

## AD CONVICTION

20. It is common cause that the complainant was robbed of his motor-vehicle and it was recovered almost three hours after the robbery. It is further common cause that the appellant was at some stage during this three-hour period inside this motor-vehicle which was robbed. The issues of major contention between the parties that were clearly before the trial Court were:

- Whether he was found inside the motor-vehicle or not;
- Whether he was the driver when it was found;
- Whether it can safely be inferred that he was one of the assailants that robbed the complainant.

21 In rejecting the appellant's version, the trial Court relied heavily on the evidence of the two policemen as gathered from its judgement. It also appears from the address of the legal representative of the appellant then that they pinned the colours of their mast on the contradiction of the evidence of these two witness as to how the appellant was removed from the car. The trial Court dismissed the said contradiction as not material. As indicated earlier, this is the gravamen of the appeal before us, and furthermore, the main reason why it is being contended that the conviction should be set aside because the evidence of the other policeman is missing. The submission of Advocate Erasmus representing the appellant is that without the transcribed record of the second police officer (Mr Mahamba), it is not possible for this Court to assess if the appellant has merit or not in his claim that the contradiction between the testimony of these witnesses is material. Further that, this Court will not be able to assess whether the trial Court's evaluation of the said contradiction was sound.

22. This Court is therefore called upon to determine whether the trial Court misdirected itself by dismissing

this contradiction as immaterial. I may pause here to indicate that irrespective of the absence of the evidence of the second police

officer, there is an abundance of sources in the remaining record of the proceedings available before us where we can rely on to consider this issue. The first source is the address of the legal representative of the appellant, the second source is the judgement

of the trial Court itself on conviction and the last one is the notice of appeal which was filed by the appellant.

23. On paginated page 105 (102 in terms of the transcribed record) it is clear that the legal representative of the appellant then pointed out to the trial Court this controversial contradiction. It is better to quote what he said to put this contradiction in a proper context:

*“The police officers are saying that the accused person was the one who was driving, who was the driver of this motor vehicle and your worship when being cross examined by the defence about the main crux of this, of his evidence that the accused was driving the motor vehicle and as to how the accused person was recovered in the motor vehicle and as to how he was removed your worship there was a material contradiction which the defence pointed out to the honourable court as to how the accused person was removed”*

*“The other testified that I was covering the other one whilst he was removing the accused person, the other one said I had to ask*

assistance from the other so that he can lift up the bag so that I can take out the accused person from the motor vehicle and your

worship that was one of the material aspects or material contradictions with the defence tried to exposed before the honourable court when these witnesses testified.”

24. In paginated page 108 (105 in terms of the record of proceedings) the record of the proceedings reveals that the trial Court furthermore engaged the legal representative about this contradiction and asked:

*“Are you saying that there are material contradictions between the two witnesses regarding to how the accused was removed from the motor vehicle?”*

The answer to this was positive and the legal representative recounted once more the contents of the remarks that I have already

quoted above. There is therefore no need to requote the answer.

25. I interpose here to indicated that it is quite clear that the emphasis of the contradiction is how or the manner in which the appellant was taken out and not where he was taken from. This distinction is important as it will become clearer later in this

## **judgment.**

- 26 In the Notice of appeal, the contradiction(s) were couched as follows as a ground of appeal:

*“ 1.6. There were material contradictions and impossibilities in the evidence of the second witness for the respondent both as to time orientation as well as in relation to his evidence in chief and his statement amongst others. There was a further contradiction between the second witness and the third witness as to how the appellant was taken out of the vehicle.”[ Own Emphasis]*

27. It is important to mention upfront that the first part of the contradictions mentioned in the Notice of Motion

relate to what the second witness of the respondent Mr Mashiane said during his viva voce evidence and in his written statement, and this evidence is not missing. Nothing much can be said about this contradiction except to say that there is nothing on record that suggests that it amounts to a contradiction at all. The record is clear that there was an exchanged between this

witness, Mr Mashiane and the legal representative of the appellant during cross-examination as to whether he said 1h55 or 1h58 in his viva voce testimony as opposed to 1h58 depicted in his statement, and the witness was adamant that he said 1h58. This time difference even

if one can accept that it was what the witness had said, is so trivial, insignificant and worse, irrelevant as it does not relate to the crucial issue before this Court as to whether the appellant was found in the car or not.

28. Of critical importance is that as far as second contradiction is concerned which is the crux of the appellant's

appeal, the trial Court dealt pertinently with it when analysing the evidence. This is the contradiction between the second and the third witness whose evidence is not before this Court. In analysing the evidence before it, the trial Court remarked firstly that, the two witnesses (the police officers) are the eye witnesses as to who was in the vehicle. Further that they corroborated each other on the following:

- That when they came across the said vehicle at the T-junction it was having one occupant who was the driver of the said car;
- When they signalled it to stop after they made a U-turn to follow it, it accelerated;
- That it overturned after missing the curve and hitting a heap of sand;
- That when they went to inspect the car after it came to a standstill they found only one person in the car;
- That the person they took out of the car is the appellant;
- That he was still strapped with a seatbelt on the driver's seat;
- They helped him to get out of the car and they placed him in the patrol car;
- A scrambling device was found on the floor inside the car together with two caps and a balaclava;
- When they took him out he was wearing one shoe and the other remained in the car.

29. Coming to the second contradiction the trial Court remarked as follows:

*"There is a contradiction between these two witnesses which was pointed out by the defence pertaining to the manner in which they took the accused out of the motor- vehicle. The defence pointed out that the one witness said they together took out the accused out of the motor-vehicle whereas the other witness testified that he was covering the other officer when he was taking out the accused out of the motor-vehicle. The defence's argument is that this contradiction is of such a nature that it takes away that the accused was inside the motor-vehicle. It is the type of contradiction which Nestadt J referred to in Mkotle 1990 (1) SACR 95 "A" where he stated that: "Contradictions per se do not lead to the rejection of the evidence of the witnesses they may simple be indicative of an error"*

30. One thread that runs through in all of the above sources that I have referred to and quoted is that these were the only contradictions that were pointed out by the legal representative of the appellant during trial regarding the evidence

of the second and the third witnesses of the respondent (the two police officers). Credence to this assessment is also found in the fact that they were only ones raised in the Notice of Appeal.

31. Of critical importance is that the manner in which the trial Court summarised the evidence of these two witnesses

as to what happened cannot be faulted at all. The trial Court tabulated the aspect of their evidence and did not leave us hanging

about what they corroborated each other on. This Court is therefore able to deduce what the evidence of the two witnesses was that was before it, how it evaluated the said evidence using the tools of aids which are corroboration, probabilities and improbabilities in this matter. Its judgment clearly reveals how it evaluated the said contradictions. This is one of the reasons why I say the absence of the evidence of Mahamba cannot prejudice the appellant including the hearing or consideration of his appeal on conviction, especially on this aspect. There is therefore, in my view, sufficient sources or material where upon this Court can be able to determine if the appellant has merit or not in his claim regarding the contradictions and how the trial Court arrived at its conclusion on this aspect.

32. Coming to the analysis of this contradiction, I fully agree with the trial Court that it is immaterial. As correctly conceded by Advocate Erasmus during the submissions, although she was at pains to make this concession, this contradiction does not at all relate to the issue that was before the trial Court or this Court. It deals with the manner in which the appellant was taken out of the car and not whether he was found inside the car or not. It does not even attempt to diffuse or shake away the fact that the appellant was found in the car. I am saying this because there is overwhelming evidence that was before the trial Court to support its finding that it is immaterial and that it cannot take away the fact that he was found inside the motor-vehicle, and thus rejecting his version that he was found outside after he was thrown out of the car from the back seat when he had not fastened the seatbelt. The following can be cited:

- The two police officers did not contradict themselves as to where he was found in the car. This much is borne out of the fact that no contradiction in this respect was raised during the submissions before the trial Court.

- The complainant during cross-examination testified in reply to the question that was put to him as to what the police told him about

where they found the appellant, he said that they said that they found the suspect inside the car. This proves a previous consistent

statement made by the police and lend credence to their credibility on this aspect.

· The two police officers according to the judgment of the trial Court, did not contradict themselves as to how many people were in

the car when they met it at the T-junction when it was closed to them. They corroborated each other that he was alone and was driving.

There is furthermore no contradiction raised by the legal representative then on these factual averments.

· They corroborated each other as to which seat (the driver's seat) they found him strapped with the seat/safety belt.

· When the legal representative of the appellant addressed the trial Court regarding the contradiction of how he was removed, he said that one police officer mentioned the fact that he had to ask assistance from the officer one to lift the "bag" so that

he can take out the accused person from the car. Although we are not told that this was an "airbag, the probabilities point to the fact that it was. If we accept this fact it lends credence that the appellant was inside the car as there are no airbags outside the car. There is furthermore no indication from the version of the appellant that he was found covered or underneath the bag which he claimed he was carrying containing clothes when he entered the car.

33. There is therefore no misdirection on the part of the trial Court to find that he was found inside the car and that he was the driver on that day of the car when it was spotted by the two police officers.

34. Nothing much turns out from the note of the clerk of the Court regarding the missing recording of the 15th of July 2015, as he indicates therein that it seems like the first part of the proceeding was not recorded at all as the proceedings did not start at the beginning. The record reveals that this happened after the witness Mashiane was warned to appear the following day because his cross examination could not be finalised. The following day, his cross examination continued but there were no formal appearances put on record. The recording started with cross examination. Nothing was raised in this appeal as to what is missing, and how it will prejudice the appellant. The fact of the matter is that nobody is able to say with precision whether there is a part of the record missing there or not. It is only speculation. This Court cannot in the circumstances make a finding that it is missing or was not transcribed. Of importance is that his evidence from the questions that were asked from the previous day and as compared to the ones starting on that day, one can easily follow what the issues were he was being cross examined on stemming from what he said the previous day. The said issues do not relate to the contradictions dealt above or any issue raised in the other grounds of appeal. In paragraph 11.1 of the same case of Leslie already quoted above the following was said:

*"11.1 Inferences can be made from the context. An available answer may adequately reveal what a missing question was[9]."*

35. The other grounds raised relates to the evaluation of the evidence as a whole by the trial Court. A lot has

been mentioned in the Notice of appeal about the fact that the Court erred in finding that the only reasonable inference that can be made is that the appellant was one of the assailant during the robbery. In my view the judgment by the trial Court is sound. The appellant was seen firstly driving the said motor-vehicle alone before it could overturn. Evidence reveals that they were following this car closely. He was found trapped in the driver's seat some few hours after the robbery took place. He was wearing hand gloves, whereas the Balaclavas were found inside the car. His version of him having hitchhiked the ride, is as correctly found by the trial Court, inherently improbable. I am saying this because the incident of the hitchhiking took place at the very late hours of the evening. In addition to this, according to his own evidence, he stayed at the location in Witbank with the alleged owner / other occupants of this car for more than two hours when according to him, he was desperate to go and visit his father who was sick.

36. There was also an issue raised to the effect that the trial Court should at the least have found the appellant

guilty of possession of a stolen motor- vehicle/property and or theft. I do not agree with this proposition. Acknowledging the risk of repetition, the trial Court also analysed this submission thoroughly in its judgment and referred to various case law relevant

in the circumstances similar to the one in casu. The record of proceedings reveals that the trial Court was alive to the said authorities which deals with the doctrine of recent possession and I find no misdirection in its application of the law to the facts of this case. In my view, the conviction of the appellant cannot be faulted.

#### AD SENTENCE

37. In as far as the sentence is concerned, the appellant was sentenced to 15 years' direct imprisonment for robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA) read with the Provisions of section 51 (2) of Act 105 of 1997. The sentence therefore falls under the minimum sentence regime. The record of proceedings reveals that he was duly informed of the minimum sentences of 15 years' direct imprisonment being applicable to the count of robbery before the charges were put to him.

38 It is common cause that the greater part of the record of proceedings where the pre-sentencing hearing was dealt with by the trial Court is missing. The only portion which is available is where the previous convictions of the appellant was handed in and discussed. The available record reveals that these previous convictions were abandoned by the State because the appellant disputed some particulars written therein. It is also clear from the sentence meted out that the trial Court treated him as a first offender, and further that it found no substantial and compelling circumstances, that warranted it to deviate from imposing the minimum prescribed sentence of 15 years in respect of the offence the appellant was convicted of.

39. Because of the paucity of information in respect of sentence, the parties were requested to file further

supplementary heads to deal with the issues the Court raised which were not covered in their heads of argument. Amongst others the following:

- whether the Court can refer the matter back to the Regional Court for sentencing to proceed afresh before a different Magistrate in the event that this Court finds that the conviction stands;
- whether the personal circumstances of the appellant found in the two affidavits filed in respect of the two bail applications attached to the record can be used by this Court in considering the sentence afresh;
- to comment on the following two cases not dealt with during their submissions:

(a) Machaba and Another v S[10]

(b) S v Leslie[11]

This Court eventually received the requested supplementary heads of argument filed by both and were taken into consideration in this

### **judgment.**

40. I am satisfied that the information before me which is found in the pre-sentencing record available, together with the one found in the two affidavits referred to above is sufficient for this Court to consider the sentence. I further find that there will be no prejudice against the appellant if his personal information available in the affidavits can be used. I furthermore fully agree with both Counsel that the circumstances of this matter are such that the matter cannot be sent back for sentencing afresh by the Regional Court and that this Court has the inherent power to consider the sentence afresh with the available information before it. It is also clear that because the conviction has been upheld by virtue of the finding I made above, the interest of justice demands that this Court consider the information available before it and sentence the appellant afresh.
41. On account of the missing record, I am constrained to revert to the two affidavits the appellant made during his two bail applications for his personal circumstances. Whilst admitting that the facts in the affidavit for the first bail application was centred in the appellant getting bail some years ago, I find solace in the fact that if you compare the personal information in the affidavit supporting his release on bail pending appeal, they are exactly the same. The latter affidavit was also made recently in May 2018. This signifies that the personal circumstances of the appellant have not changed since he was arrested or his first bail application.
42. From the judgment on conviction the trial Court indicated that he is 34 years of age. In the second affidavit supporting his bail pending appeal the appellant indicated that he was 35 years and not married. He contributed towards maintaining his elderly parents and other

siblings before he was arrested. He was employed by his father as a Taxi driver. In addition to this he was also operating a tuckshop from his residence at 1979 Dlamini Street, Phola Ogies, Mpumalanga. He is a South African citizen and his family lives with him in this address. He is not a member of a gang or syndicate. He at all the times provided the police with correct information which they required and co-operated with them. In the first affidavit he indicated that he earned R4500-00 per month and had worked for his father since 2012.

43. The following aggravating factors are present in this matter:

- (a) the complainant was robbed at the time he was spending time with his girlfriend in the sanctity and comfort of his car;
- (b) the appellant did not act alone;
- (c) a firearm was used in the commission of the offence;
- (d) the motor-vehicle of the complainant was recovered damaged beyond repair;
- (e) as a result, he had to buy another car;
- (f) this type of offence is rife in our Country.

44. What counts in favour of the appellant is that he will be treated as a first offender because the previous

convictions were not proven against him. The period he served in custody awaiting trial is not very long as he was kept in custody

since his arrest on 5 November 2014 until he was convicted and sentenced on the 11th and 13th November 2015 respectively. It is a period of a year and a neutral factor in my view.

45. Coming back to the previous convictions, even though this Court treated him as a first offender as they were not proved, I am of the view that it is worth noting that the appellant only queried the sentences in respect of them and not the convictions per se. The record shows the following discussions:

*“Court : Do you accept the previous convictions sir?”*

Accused : No. There are mistakes here your Worship. In relation to the case of escaping, I was sentenced to 12 months and that is it your Worship and I served the sentence in totality in 2005 I was sentence to three

months for common assault” [Own Emphasis]

46. From the above discussion it is clear that the Prosecutor abandoned the previous convictions solely on the reason

that the appellant disputed the sentences that were meted out by the previous Courts. This Court cannot therefore lose sight of the fact that from the appellant's own admission during the debate about his previous conviction as depicted above, he had previous brushes with the law. It is therefore clear that his admission reveals the type of character he is and unfortunately, militates against his prospects of rehabilitation. It appears he is a person who does not respect other people inclusive of the law itself.

47. In addition to the above, the legislator has already taken into consideration the fact that accused may well be first offenders in the commission of the offences similar to the one the appellant was convicted of, and prescribed an imprisonment for a period not less than 15 years in these regard. In *S v Malgas*[12] it was said that specified sentences are not to be departed from lightly and for flimsy reasons. One of the factors which the Courts

were warned to exclude is aversion to imprisoning first offenders. Of course, at most, this factor can be taken into consideration in conjunction with other factors to persuade the sentencing Court to deviate. But in the circumstances of this matter, it cannot, because there are no other factors that can be referred to which when cumulatively taken together with this factor, can amount to substantial and compelling circumstances.

48. I am saying this because as already indicated above, the period spent in custody is neutral. The fact that there was no person who was injured in the process is outweighed by the aggravating circumstances present in casu which I enumerated above. In addition, his personal circumstances are ordinary. In *S v Vilakazi*[13] it was said that in respect of:

*"... serious crime the personal circumstances of the offender .... recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are largely immaterial to what the period should be ...."*

49. In my view, there are no substantial and compelling circumstances which warrant this Court to deviate from imposing the minimum sentence of fifteen (15) years' prescribed in this matter. A proper balance of the objects and the purpose of sentencing informs me that this is a matter deserving an imprisonment for a long period so that it can serve as deterrent to the appellant, including the other would be criminals for these kind of offences.

50. The following Order is therefore made:

50.1 The Point in Limine raised by the appellant is dismissed;

50.2 The appeal against both the conviction and the sentence are dismissed.

50.3 The appellant is sentenced to fifteen years' direct imprisonment.

50.4 The sentence is antedated to the 13 November 2015.

KGOELE ADJP

JUDGE OF THE HIGH COURT

I agree,

BAM AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Legal representative of the Appellant:

Adv. Erasmus

Instructed by:

Legal Aid SA (Middelburg)

Counsel for the Respondent:

Adv. Motheogane

Instructed by:

DPP (Middelburg)

Date reserved

16 March 2020

Date handed down

15 June 2020

[1] 2017 (2) SACR (1) (CC)

[2] S v Chabedi 2005 (1) SACR 415 (SCA) at [5].

[3]

(1) SACR 347 (W)

[4] S v Whitney and Another 1975 (3) SA 453 (N) at 453H, S v Selake 1978

(1) SA 993 (T) 994E.

[5]

[2015] 2 ALL SA 552 (SCA)

[6] 2006 (2) SACR 4 (C),

[7] 2008 (2) SACR 626 (NC)

[8] 2001 (1) SACR 495 (SCA)

[9] S v Whitney (supra at 456A • B).

[10]

[2015] 2 ALL SA 552 (SCA)

[11] 2000 (1) SACR 347 (W)

[12] 2001 (1) SACR 469 (SCA)

[13] 2012 (6) ZASCA 87 (SCA)

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